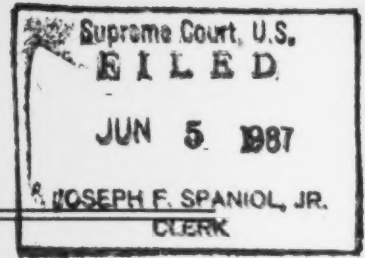


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No. 86-1795



In the Supreme Court of the United States

October Term, 1986

ROBERT J. KONDRAT,

Petitioner,

vs.

BARRY M. BYRON, MELVIN G. SCHAEFER
AND GEORGE KRAINCIC,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an award of attorneys' fees to defendants proper where a *pro se* plaintiff files the same frivolous action in seven separate lawsuits in both the federal and state courts in which all seven cases are dismissed and the dismissals affirmed on appeal?

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**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI**

STATEMENT OF CASE AND FACTS

On July 21, 1983, Plaintiff-Petitioner filed suit in the United States District Court, Northern District of Ohio (Eastern Division), Case No. C83-2953, against Defendants-Respondents, Barry M. Byron, Melvin G. Schaefer, and George Kraincic.

Petitioner alleged that the three Respondents failed to enforce Codified Zoning Ordinance Section 1337.02 of the City of Willoughby Hills, Ohio, which caused Petitioner's property to be devalued. Petitioner sought Three Hundred Thousand Dollars (\$300,000.00) in damages for alleged violations of the Fourteenth Amendment's due process and equal protection clauses.

On July 9, 1984, Judge Ann Aldrich issued a comprehensive memorandum and order firmly explaining that Petitioner had brought this same action on two prior occasions and that Petitioner had appropriate state court remedies available. Judge Aldrich *dismissed* the action (Appendix to Petition, pp. A6-A15).

The July 9, 1984 order was appealed and affirmed by the United States Court of Appeals, Sixth Circuit, on April 17, 1985, being Case No. 84-3624 (Appendix, p. A1).

As stated above, this was not the first time that Petitioner brought an action against the City of Willoughby Hills and its officials to enforce the aforementioned zoning ordinance and recover damages.

Judge Aldrich, in her July 9, 1984 memorandum and order discussed Petitioner's prior frivolous actions, as follows:

"In fact, this is the third in a series of related cases. The first, brought in the Court of Common Pleas of Lake County, *Kondrat v. City of Willoughby Hills*, No. 80-CIV-1263 (Jan. 22, 1982) named the City of Willoughby Hills as defendant. Finding governmental immunity, no actionable violation of the zoning ordinance, no evidence of property devaluation for the period of 1976 to 1979, and no genuine issue for trial, the trial court granted the City's motion for summary judgment. On appeal, Kondrat chose to argue that the judicial officer who assigned his case was biased. The State Court of Appeals found no support for his argument and upheld the trial court's interpretation of the law, *Kondrat*, No. CA 0-069 [sic] (Aug. 30, 1982). Kondrat's motion to certify the record was overruled *sua sponte* by the Ohio Supreme Court. *Kondrat*, No. 83-804 (October 26, 1983). The United States Supreme Court denied Kondrat's petition for writ of certiorari, *Kondrat*, U.S., 103 S.Ct. 2091, *cert. denied* (1983).

The second action, also alleging refusal to enforce the City's zoning ordinance Chapter 1337.02, named the same defendants who are before the Court in this action. Finding that an action for damages could not be sustained against the Willoughby [Hills] Officials, the trial court granted their motion for summary judgment. *Kondrat v. Schaefer*, No. 83-CIV-0496 (Lake County C.P., Mar. 15, 1984). The Common Pleas Court suggested that Kondrat was not without remedy since he could bring a nuisance suit against his neighbor or bring a mandamus action to exact performance."

Subsequent to Judge Aldrich's trial court decision Petitioner filed four (4) more separate lawsuits based upon the same or similar issues as the prior three (3) frivolous actions. The cases are cited as follows:

- (1) *Kondrat v. Byron*, United States District Court, Northern District (Eastern Div.), Case No. C84-1230
- (2) *Kondrat v. Aldrich*, United States District Court, Northern District (Eastern Div.), Case No. C85-125
- (3) *Kondrat v. Byron*, United States District Court, Northern District (Eastern Div.), Case No. C86-2384
- (4) *Kondrat v. Byron*, United States District Court, Northern District (Eastern Div.), Case No. C86-4912

All of the aforementioned actions were dismissed in favor of the Respondents. Case No. C84-1230 was appealed and affirmed by the United States Court of Appeals, Sixth Circuit, Case No. 84-3702; Case No. C85-125 was also ap-

pealed and affirmed by the Sixth Circuit Court of Appeals in Case No. 85-3129. The appeal time on Case No. C86-4912 has not yet run, but it is fairly safe to say that Petitioner will appeal that decision. Case No. C86-2384 was voluntarily dismissed by Petitioner, however, he filed the exact same action in Case No. C86-4912.

In fact, the attached list of lawsuits filed by Petitioner clearly demonstrates the disrespect Petitioner has for the judicial system and for these Respondents (Appendix, p. A3). To date, Petitioner has filed at least eighty (80) lawsuits in both the federal and state courts (Appendix, p. A3). Fifty-four (54) of these lawsuits were filed against the City of Willoughby Hills and/or its officials (Appendix, pp. A3-A7).

On July 19, 1984, Respondents herein filed their motion for an award of attorney fees pursuant to Title 42 U.S.C. 1988 in Case No. C83-2953.

Judge Ann Aldrich issued an order on June 25, 1985, which held that Respondents were entitled to attorney fees in the sum of Three Thousand Six Hundred Two and 40/100 Dollars (\$3,602.40) (Appendix to Petition, pp. A4-A5).

On July 5, 1985, Petitioner filed his notice of appeal from the June 25, 1985 order claiming that the lower court had acted in bad faith and that counsel was not entitled to fees. The United States Court of Appeals, Sixth Circuit, affirmed that decision on February 23, 1987 (Appendix to Petition, pp. A1-A3). The Appellate Court, in their opinion, stated, the following:

"In the instant case, the district court awarded attorney's fees to the defendants after finding that Kondrat's action was frivolous. This finding is amply

supported by the record. This suit marked the third time that Kondrat had brought suit on this subject matter. On every occasion, the defendants prevailed. Although we do realize that Kondrat has been acting *pro se* and 'attorney's fees should rarely be awarded against such plaintiffs,' *Hughes v. Rowe*, 449 U.S. 5, 15 (1980), there comes a point when even the uncounselled plaintiff who persistently brings frivolous and meritless suits must be held accountable. Kondrat has reached this point.

Therefore, the judgment of the district court is **AFFIRMED."**

Petitioner has brought this eightieth (80th) frivolous action based upon the February 23, 1987 Opinion of the United States Court of Appeals for the Sixth Circuit to this Court. Petitioner has requested that the Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to examine the issues he has raised.

ARGUMENT

I. ATTORNEYS' FEES MAY BE ASSESSED AGAINST A PLAINTIFF WHEN HIS CLAIMS ARE FRIVOLOUS, UNREASONABLE OR WITHOUT FOUNDATION.

The Respondents were clearly the prevailing party in Case No. C83-2953, and are therefore entitled to an award of attorney fees pursuant to 42 U.S.C. §1988. That section provides that "the Court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." This Court has held that when the prevailing party is a de-

fendant, the district court may assess fees against the plaintiff only upon a finding "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though there was an absence of subjective bad faith." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 90 S. Ct. 694, 700, 54 L. Ed. 2d 648 (1978).

The *Christiansburg* decision, *supra*, determined that Congress intended to provide some protections to prevailing defendants. Citing *Grubb v. Butz*, 548 F.2d 973, 975 (1976), this Court, in *Christiansburg*, emphasized the significance of protecting defendants from burdensome litigation:

"... But, second and equally important, Congress intended to deter the bringing of lawsuits without foundation by providing that the prevailing party—be it plaintiff or defendant—could obtain legal fees."

While the Supreme Court in *Christiansburg*, *supra*, addressed the question of the standard applicable to the attorneys fee provisions of Section 706(K) of Title VII of the Civil Rights Act of 1964, the provisions are virtually identical to those of Section 1988 at issue in this case.

In *Hughes v. Rowe*, 449 U.S. 5, 14-15, 101 S. Ct. 173, 178-179, 66 L. Ed. 2d 163 (1980) (per curiam), the Court applied the *Christiansburg* test in actions brought pursuant to Section 1983, although the plaintiff in *Hughes* was an uncounselled prisoner, this Court's language is clear:

"In *Christiansburg Garment Co. v. EEOC*, 434 U.S. (1978), we held that the defendant in an action brought under Title VII of the Civil Rights Act of 1964 may recover attorney's fees from the plaintiff

only if the District Court finds 'that the plaintiff's actions was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.' *Id.* at 421. [98 S.Ct. at 700]. Although arguably a different standard might be applied in a civil rights action under 42 U.S.C. §1983, we can perceive no reason for applying a less stringent standard. The plaintiff's action must be meritless in the sense that it is groundless or without foundation . . ."

Id. 449 U.S. at 14, 101 S. Ct. at 178.

The application of the *Christiansburg* standard for the award of attorney fees to defendants under Section 1988 has been adopted by many courts. *Campbell v. Cook*, 706 F.2d 1084, 1086 (10th Cir. 1983); *Weich v. City of Berlin*, 673 F.2d 192 (7th Cir. 1982); *Reichenberger v. Pritchard*, 660 F.2d 280 (7th Cir. 1981).

Both the District Court herein and the Sixth Circuit Court of Appeals correctly determined that Petitioner's action was frivolous. The District Court specifically noted that this same action was filed by Petitioner three separate times in both the federal and state courts.

The City of Willoughby Hills and its officials have been required to defend each case and the City has expended thousands of dollars in defense of these lawsuits. Municipal funds have thus been channeled into a completely non-productive and frustrating activity.

As stated in the facts, to date Petitioner has filed eighty (80) lawsuits against the City of Willoughby Hills and/or its officials, among others (Appendix, p. A3).

On every occasion, except for those cases currently pending, the Respondents and other defendants have prevailed!

It should be emphasized that an award of attorney fees for the defense of multiple, frivolous litigation has previously been affirmed in *Tonti v. Petropoulos*, 656 F.2d 212 (6th Cir. 1981).

The decision to award attorneys' fees is committed to the discretion of the trial judge. 42 U.S.C. §1988; *Christiansburg, supra*.

The trial court herein sought fit to apply the *Christiansburg* standard. Judge Aldrich determined that petitioner's action was clearly frivolous. The Appellate Court affirmed the District Court's order and utilized deterrent language in its order. Both courts determined that petitioner must be held accountable for the continued filing of frivolous and meritless suits.

The standard of appellate review of a district court's award of attorneys' fees to a prevailing party under §1988 is whether the trial court abused its discretion in making or denying the award. *Reichenberger v. Pritchard*, 660 F.2d 280, 288 (7th Cir. 1981).

The Seventh Circuit Court of Appeals in *Reichenberger, supra*, has outlined several factors for an appellate court to aid in determining whether the trial court properly exercised its discretion.

"In seeking to determine whether a suit is frivolous, unreasonable or groundless, courts have focused on several factors. Among those considered are whether the issue is one of first impression requiring judicial resolution; whether the controversy is sufficiently based upon a real threat of injury to plaintiff; whether the trial court has made a finding that the suit was frivolous under the *Christiansburg* guidelines, and whether the record would support such a finding."

The Sixth Circuit Court of Appeals, followed these stringent guidelines and affirmed the trial court's decision. It is clear that there was absolutely no abuse of discretion on behalf of the trial court in granting said fees. The award of attorneys' fees is within the court's "inherent equitable power." *Hall v. Cole*, 412 U.S. 1, 5, 93 S. Ct. 1943, 1946, 36 L. Ed. 2d 702 (1973).

Therefore, the award of attorney fees to Respondents was proper due to the frivolous, unreasonable and groundless claims filed by Petitioner.

CONCLUSION

Therefore, based on the foregoing and the attached appendix, Respondents, Barry M. Byron, Melvin G. Schaefer and George Kraincic respectfully request that the petition for a writ of certiorari filed by Robert J. Kondrat be denied.

Respectfully submitted,

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APPENDIX

**ORDER OF THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

(Filed April 17, 1985)

No. 84-3624

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT J. KONDRAT,
Plaintiff-Appellant,

v.

BARRY M. BYRON; MELVIN G. SCHAEFER;
GEORGE KRAINCIC,
Defendants-Appellees.

ORDER

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.]

BEFORE: KENNEDY and CONTIE, *Circuit Judges*; and
EDWARDS, *Senior Circuit Judge*

Kondrat appeals pro se from the district court's grant of summary judgment in favor of the defendants in this civil rights case. This appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. After an examination of the record and the briefs, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Kondrat is a resident of Willoughby Hills, Ohio. The defendants are the mayor, a city councilman, and the law director of the city. Kondrat's complaint alleges that the defendants caused the value of his property to decline by failing to prevent a neighbor's property from becoming an eyesore. Kondrat raised state law, due process, and equal protection claims.

The district court held that Kondrat's state law claim was barred by the doctrine of res judicata. We agree with this conclusion, and we also hold that Kondrat's entire complaint was barred by res judicata. The Supreme Court has held that a federal court under §1983 must apply the state law of res judicata. *Migra v. Warren City School Dt. Bd. of Ed.*, U.S., 104 S.Ct. 892, 898 (1984). The state of Ohio applies a broad doctrine of res judicata that bars any issue that could have been raised in an earlier suit. *Johnson's Island, Inc. v. Bd. of Twp. Trustees*, 69 Ohio St.2d 241, 244 (1982). Therefore, the earlier suit that Kondrat filed in state court against these same defendants on the state law claim would also bar his federal claims under §1983.

Even if his claims were not barred by res judicata, the judgment of the district court would still be affirmed. The only issue which Kondrat raises on appeal is the equal protection issue. The enforcement of an otherwise valid ordinance only violates the equal protection clause if the ordinance is applied or enforced with a discriminatory intent or purpose. *Scudder v. Town of Greendale*, 704 F.2d 999, 1002 (7th Cir. 1983). This intent or purpose must be based on an unjustifiable standard such as race, religion, or other arbitrary classification. *Teague v. Alexander*, 662 F.2d 79, 83 (D.C. Cir. 1981).

Here Kondrat's complaint contains only conclusory allegations that the defendants acted with a discriminatory

intent and contains no allegations that the actions were based on an unjustifiable standard such as race, religion, or other arbitrary classification. So there is no valid equal protection clause issue here.

The judgment of the district court is affirmed under Rule 9(d)(3), Rules of the Sixth Circuit, because the issues are not substantial and do not require oral argument.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

KONDRAT CASES

1. *Kondrat v. Mitrovich, et al.*, Lake County Common Pleas Court, Case No. 77-CIV-917
2. *Kondrat v. Mitrovich, et al.*, Eleventh District Court of Appeals, Case No. CA7-093
3. *Kondrat v. Mitrovich, et al.*, Eleventh District Court of Appeals, Case No. CA7-073
4. *Kondrat v. Mitrovich, et al.*, Eleventh District Court of Appeals, Case No. CA9-185
5. *Kondrat v. Mitrovich, et al.*, Ohio Supreme Court, Case No. 79-1502
6. *Kondrat v. Mitrovich, et al.*, United States Supreme Court, Case No. 79-1775
7. *Kondrat v. Byron, et al.*, Lake County Common Pleas Court, Case No. 77-CIV-918
8. *Kondrat v. Byron, et al.*, Eleventh District Court of Appeals, Case No. CA8-174

9. *Kondrat v. Byron, et al.*, Case No. CA7-047, Eleventh District Court of Appeals, Case No. CA7-047
10. *Kondrat v. Byron, et al.*, Eleventh District Court of Appeals, Case No. CA6-292
11. *Kondrat v. Byron, et al.*, Eleventh District Court of Appeals, Case No. CA8-134
12. *Kondrat v. Byron, et al.*, Eleventh District Court of Appeals, Case No. CA10-001
13. *Kondrat v. Byron, et al.*, Ohio Supreme Court, Case No. 84-1540
14. *Kondrat v. Byron, et al.*, Ohio Supreme Court, Case No. 83-83
15. *Kondrat v. Byron, et al.*, United States Supreme Court, Case No. 79-1710
16. *Kondrat v. O'Ryan*, Lake County Common Pleas Court, Case No. 79-CIV-87
17. *Kondrat v. O'Ryan*, Eleventh District Court of Appeals, Case No. CA8-107
18. *Kondrat v. O'Ryan*, Eleventh District Court of Appeals, Case No. CA8-006
19. *Kondrat v. O'Ryan*, Ohio Supreme Court, Case No. 80-738
20. *Kondrat v. O'Ryan*, Ohio Supreme Court, Case No. 81-802
21. *Kondrat v. City of Willoughby Hills*, Lake County Common Pleas Court, Case No. 80-CIV-1263
22. *Kondrat v. City of Willoughby Hills*, Eleventh District Court of Appeals, Case No. CA9-069

23. *Kondrat v. City of Willoughby Hills*, Ohio Supreme Court, Case No. 82-1415
24. *Kondrat v. City of Willoughby Hills*, Ohio Supreme Court, Case No. 83-804
25. *Kondrat v. City of Willoughby Hills*, United States Supreme Court, Case No. 82-1115
26. *Kondrat v. Byron*, Lake County Common Pleas Court, Case No. 81-CIV-956
27. *Kondrat v. Byron*, Eleventh District Court of Appeals, Case No. CA9-179
28. *Kondrat v. Byron*, Ohio Supreme Court, Case No.
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29. *Kondrat v. Schaefer, et al.*, Lake County Common Pleas Court, Case No. 83-CIV-497
30. *Kondrat v. Schaefer, et al.*, Eleventh District Court of Appeals, Case No. CA11-163
31. *Kondrat v. Schaefer, et al.*, Eleventh District Court of Appeals, Case No. CA10-147
32. *Kondrat v. Schaefer*, Lake County Common Pleas Court, Case No. 84-CIV-1231
33. *Kondrat v. City of Willoughby Hills*, United States District Court (Eastern Division), Case No. C77-464
34. *Kondrat v. City of Willoughby Hills*, United States Court of Appeals, Sixth Circuit, Case No. 77-3405
35. *Kondrat v. Byron*, United States District Court, Northern District (Eastern Division), Case No. C83-2953
36. *Kondrat v. Byron*, United States Court of Appeals, Sixth Circuit, Case No. 84-3624

37. *Kondrat v. Byron*, United States Court of Appeals, Sixth Circuit, Case No. 85-3530
38. *Kondrat v. Byron*, United States District Court, Northern District (Eastern Division), Case No. C84-1230
39. *Kondrat v. City of Willoughby Hills*, United States Supreme Court, Case No. 82-1559
40. *Kondrat v. Martinet*, Lake County Common Pleas Court, Case No. 79-CIV-932
41. *Kondrat v. Martinet*, Eleventh District Court of Appeals, Case No. CA9-22
42. *Kondrat v. Martinet*, Ohio Supreme Court, Case No. 82-1655
43. *Kondrat v. Martinet*, United States Supreme Court, Case No. 82-1411
44. *Kondrat v. Byron, et al.*, Lake County Common Pleas Court, Case No. 85-CIV-0061
45. *Kondrat v. Byron, et al.*, Eleventh District Court of Appeals, Case No. CA11-77
46. *Kondrat v. Byron, et al.*, Ohio Supreme Court, Case No.
47. *Kondrat v. Byron, et al.*, Lake County Common Pleas Court, Case No. 85-CIV-1377
48. *Kondrat v. Byron, et al.*, Lake County Common Pleas Court, Case No. 87-CIV-355
49. *Kondrat v. Schaefer*, Lake County Common Pleas Court, Case No. 87-CIV-362
50. *Kondrat v. Byron*, United States District Court, Northern District (Eastern Division), Case C86-2384

51. *Kondrat v. Byron*, United States District Court, Northern District (Eastern Division), Case No. C86-4912
52. *Kondrat v. Byron*, United States Supreme Court, Case No. 79-1710
53. *Kondrat v. Byron, et al.*, Ohio Supreme Court, Case No. 87-590
54. *Kondrat v. Byron, et al.*, United States Supreme Court, Case No. 86-1795
55. *Kondrat v. Weston, Hurd, Fallon, Paisley & Howley*, Lake County Common Pleas Court, Case No. 85-CIV-1553
56. *Kondrat v. Weston, Hurd, Fallon, Paisley & Howley*, Eleventh District Court of Appeals, Case No. CA11-258
57. *Kondrat v. Weston, Hurd, Fallon, Paisley & Howley*, Ohio Supreme Court, Case No.
58. *Kondrat v. O'Neill, et al.*, Lake County Common Pleas Court, Case No. 86-CIV-381
59. *Kondrat v. Quandt, Giffels, Buck & Rodgers*, Lake County Common Pleas Court, Case No. 87-CIV-402
60. *Kondrat v. Jimmy Carter*, United States District Court, Northern District (Eastern Division), Case No. C77-1275
61. *Kondrat v. Jimmy Carter*, United States Court of Appeals, Sixth Circuit, Case No. 78-3153
62. *Kondrat v. Cyrus Vance, et al.*, United States District Court, Northern District (Eastern Division), Case No. C80-299
63. *Kondrat v. Cyrus Vance, et al.*, United States Court of Appeals, Sixth Circuit, Case No. 80-3718

64. *Kondrat v. Department of Justice*, Northern District (Eastern Division), Case No. C81-274
65. *Kondrat v. Department of Justice*, United States Court of Appeals, Sixth Circuit, Case No. 81-3172
66. *Kondrat v. American Bar Association*, United States District Court, Northern District (Eastern Division), Case No. C82-896
67. *Kondrat v. American Bar Association*, United States Court of Appeals, Sixth Circuit, Case No. 83-3157
68. *Kondrat v. Sherrod Brown*, United States District Court, Northern District (Eastern Division), Case No. C84-645
69. *Kondrat v. Aldrich*, United States District Court, Northern District (Eastern Division), Case No. C85-125
70. *Kondrat v. Aldrich*, United States Court of Appeals, Sixth Circuit, Case No. 85-3129
71. *Kondrat v. O'Neill*, United States District Court, Northern District (Eastern Division), Case No. C85-1070
72. *Kondrat v. O'Neill*, United States Court of Appeals, Sixth Circuit, Case No. 86-3263
73. *Kondrat v. Celebrezze*, United States District Court, Northern District (Eastern Division), Case No. C86-1076
74. *Kondrat v. Celebrezze*, United States Court of Appeals, Sixth Circuit, Case No. 87-3012
75. *Kondrat v. Celebrezze*, United States District Court, Northern District (Eastern Division), Case No. C86-3851

76. *Kondrat v. Manos*, United States District Court, Northern District (Eastern Division), Case No. C87-512.
77. *Kondrat v. Department of Justice*, United States Supreme Court, Case No. 81-2055
78. *Kondrat v. U.S. State Department*, United States Supreme Court, Case No. 81-2141
79. *Kondrat v. Celebrezze*, Southern District of Ohio, Case No. C-2-84-1416
80. *Kondrat v. The United States*, U.S. Court of Claims, Case No. 497-80C